Hillard Development Corporation d/b/a Provident Nursing Home *and* Service Employees International Union Local 2020.[1] Case 1–CA–42263

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 2, 2005, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Hillard Development Corporation d/b/a Provident Nursing Home, Boston, Massachusetts, it officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring

In its exceptions the Respondent moved to reopen the record to admit the 2004 bargaining notes of its lead negotiator, Charlene Kaye. The Respondent did not seek to admit the affidavit of Ms. Kaye that was submitted with its exceptions. Ms. Kaye's notes alone are insufficient to support a defense that the Union was on notice as to the limitation on her authority to bind the Respondent to an agreement.[5] I therefore concur in finding that the Respondent violated Section 8(a)(5) by refusing to execute the collective-bargaining agreement reached by the parties' chief negotiators.

I write separately to clarify a point of fact and to express concern regarding the manner in which the judge questioned Ms. Kaye. With respect to the factual issue, the judge stated in his decision that Ms. Kaye admitted that "she was fully vested with complete authority . . . to reach a final and binding agreement." In fact, Ms. Kaye simply responded "yes" when asked by the judge if, when she entered into negotiations on behalf of the Respondent, she had "authority to enter into those negotiations with a sincere effort to reach a collective bargaining agreement with the Union." Authority to engage in good-faith bargaining to reach an agreement is not the same thing as complete authority to reach a final and binding agreement. The terms produced through an agent's good-faith negotiations are often subject to approval or ratification by a principal.

With respect to the judge's questioning of Ms. Kaye, the Board's Rules and Regulations provide that it is "the duty of an administrative law judge to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice . . . as set forth in

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] We agree with the judge's finding that the Respondent's negotiator, Charlene Kaye, had authority to reach a final and binding contract with the Union. Assuming arguendo, however, that Kaye did not have authority to bind her principal, the Respondent was required to give clear and unambiguous notice of that fact to the Union. The Respondent did not do this, and therefore its failure to execute the contract violated Sec. 8(a)(5) of the Act. *Mid-Wilshire Health Care Center*, 337 NLRB 72 at 79, 80 (2001); *Induction Services*, 292 NLRB 863 (1989).

[3] In its exceptions, the Respondent contends for the first time that the case should have been deferred to the grievance-and-arbitration procedures of the collective-bargaining agreement. We find no merit to this contention. The Respondent failed to raise deferral as an affirmative defense in its answer to the complaint or at the hearing; its interjection of this defense after the hearing closed is therefore untimely. See *Master Mechanical Insulation*, 320 NLRB 1134 (1996); *MacDonald Engineering*, 202 NLRB 748 (1973).

In its brief, the Respondent, which was not represented at the hearing by an attorney, moved to reopen the record to submit documents as exhibits. The Respondent contends that it was not aware at the time of the hearing that it could introduce documents. We deny the motion. We have carefully reviewed the record in light of the Respondent's contention and find that as the Respondent was accorded a full and fair opportunity to present its case, the Respondent's contention is without merit. Further, the documents that the Respondent seeks to introduce would not require a different result in this case. Thus, Kaye's bargaining notes do not demonstrate that the Union was given the requisite clear and unambiguous notice that Kaye did not have authority to reach a final and binding contract with the Union.

[4] We note that the Respondent, now represented by counsel, does not contend that the judge engaged in any improper conduct. Accordingly, we do not see that issue as being one that is before the Board.

[5] In its brief in support of its exceptions, the Respondent, in a footnote, moves to reopen the record to submit documents as exhibits. In the text of the brief, the Respondent identifies those documents as Ms. Kaye's notes of the bargaining sessions.

the complaint . . . " Section 102.35. The rule, thereafter, lists the powers of an administrative law judge with respect to cases assigned to him which include "administering oaths and affirmations" and the power "to call, examine, and cross-examine witnesses and to introduce into the record documentary evidence." In the normal course, the elicitation of pertinent facts is ably handled by counsel for the parties. Where a litigant appears pro se, however, a judge faces a more difficult challenge and must balance both the duty to elicit fact and the obligation to "meticulously avoid [showing actual partiality by] viewing either party's case or witnesses with bias or prejudice . . . [or] . . . the appearance of [partiality]." *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950).

Here, the Respondent appeared pro se through its lead negotiator, Ms. Kaye. Before the General Counsel called its first witness, the judge asked Ms. Kaye a series of questions regarding the extent of her authority to bind the Respondent. However he asked no questions concerning the representations, if any, Ms. Kaye may have made to the Union's negotiators concerning the scope of that authority. Questioning Ms. Kaye under oath during the hearing certainly would have been an appropriate, and perhaps necessary, step in furtherance of judge's duty to inquire fully into the facts. Here, however, the judge questioned Ms. Kaye on the record, before the General Counsel had opened his case, and before the witness was even sworn. He then relied on Ms. Kaye's unsworn responses in his decision, which mischaracterized what she actually said. Further, the judge did not develop a full record. As mentioned, while he asked Ms. Kaye a number of questions concerning her limited authority, he never asked her whether she informed the Union of the scope of her authority. Nor did the judge ask any similar questions of the Union's chief negotiator, who was the General Counsel's only witness.

Respondent, now appearing through counsel, effectively seeks to do so through its motion to reopen. For the reasons set forth above, Respondent's effort is unsuccessful.

Dated, Washington, D.C. August 27, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Joseph F. Griffin., Esq for the General Counsel.
Charlene Kaye of Boston, Massachusetts, for the Respondent-Employer.
Mike Fadel, of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on April 18, 2005 in Boston, Massachusetts, pursuant to a complaint and notice of hearing in the subject case (complaint) issued on March 2, 2005, by the Regional Director for Region 1 of the National Labor Relations Board (Board). The underlying charge was filed on December 7, 2004,[1] by Service Employees International Union, Local 2020, AFL–CIO, CLC (the Charging Party or Union) alleging that Hillard Development Corporation, d/b/a Provident Nursing Home (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issue

The complaint alleges that the Respondent refused to execute, upon request of the Union, a collective-bargaining agreement after the parties' reached complete agreement on terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the business of operating a nursing home at its facility in Boston, Massachusetts. Respondent, in conducting it business operation during calendar year 2004, derived gross revenues in excess of $100,000 and purchased and received at its facility goods valued in excess of $10,000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Facts

On April 2, 1997, the Union was certified as the exclusive collective-bargaining representative of the unit. On June 5, 1997, the General Counsel of the Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain and to furnish necessary and relevant informa-

[1] All dates are 2004 unless otherwise indicated

tion. On July 7, 1997, the General Counsel filed a Motion for Summary Judgment with the Board.

The Board, on August 20, 1997, issued a Decision and Order in *Hillard Development Corporation d/b/a Provident Nursing Home*, 324 NLRB No. 46 (not reported in Board volumes), finding in pertinent part that the Respondent by refusing on and after May 14, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the unit engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The Board ordered the Respondent to bargain on request with the Union, and if an understanding is reached, to embody the understanding in a signed agreement.

In 1998, the Respondent filed a petition in bankruptcy. While the petition was pending, the parties' engaged in collective bargaining negotiations and an initial collective-bargaining agreement was reached to be effective from January 1, 2001 through May 31, 2003. During the course of these negotiations, Charlene Kaye, the administrator of Respondent, served as its chief negotiator. [2]

Since the parties were subject to the jurisdiction of the bankruptcy court when the agreement was reached, the Union filed a motion with the court to approve the parties' collective-bargaining agreement. By Order dated April 16, the bankruptcy court approved the collective-bargaining agreement. See, In re: *The Hillard Development Corporation, d/b/a Provident Nursing Home*, 2004 WL 1347049, 174 L.R.R.M. 3364 (Bankr. S.D. FLA.). The Order also stated that future bargaining between the parties is part of the ordinary course of business and does not require approval of the Court.

By letter dated April 22, the Union demanded that the Respondent immediately commence bargaining on the terms and conditions of a successor agreement (GC Exh. 3). In due course, the parties agreed to commence negotiations between July 6 and July 13. The Union was represented during the negotiations by Organizing Director Mike Fadel while the Respondent was represented by Kaye.[3] After extensive negotiations during this period, an agreement was consummated between the parties. Kaye stated on the record and confirmed in writing to the Union on July 14, that the parties reached a final and binding collective-bargaining agreement (GC Exh. 9). The agreement was reduced to writing and became effective from August 1 to May 31, 2005 (GC Exh. 10).

As part of this agreement, the parties' agreed to certain wage increases in Article 9 and Appendix A, and changes to sick leave entitlements in Exhibit E that were to take effect on August 1. Kaye admitted on the record that despite this agreement, the emoluments were not implemented by the Respondent on August 1.

[2] Kaye admitted, in the subject case, that she continues to be the Administrator of Respondent and is a supervisor and agent within the meaning of Sec. 2(11) and 2(13) of the Act.

[3] Kaye admitted on the record that she was vested with full authority by Respondent's owner Richard Wolfe to negotiate over terms and conditions of employment with the Union and to reach an agreement between the parties. Kaye, however, stated that she did not have the authority to sign any agreement.

B. Discussion

The General Counsel asserts that the parties' reached complete agreement on terms and conditions of employment to be incorporated in a collective-bargaining agreement but since on or about July 19, the Respondent has refused to execute the agreement.

Respondent denies that it entered into a successor collective-bargaining agreement with the Union and further argues that only Wolfe has the authority to execute an agreement assuming one was reached between the parties. Additionally, the Respondent opines that jurisdiction to approve any successor collective-bargaining agreement is vested in the bankruptcy court rather than the Board.

The Supreme Court held in *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941), that an employer violates Section 8(a)(5) of the Act by refusing to execute a written contract incorporating the terms of a collective-bargaining agreement reached with a union representing its employees. The Board has held that the filing of a petition in bankruptcy normally does not relieve or suspend a respondent's obligation to execute on request the complete and final agreement negotiated by the parties'. Indeed, it is well settled that the institution of bankruptcy proceedings generally does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to final disposition. See *Image Systems*, 285 NLRB 370 (1987).

Based on the forgoing, and particularly noting Kaye's admission on the record that she was fully vested with complete authority to negotiate over terms and conditions of employment with the Union and reach a final and binding agreement, I find that the Respondent entered into a collective-bargaining agreement on July 14 with the Union. Thus, I reject the Respondent's argument that in order to have a binding agreement, it had to be executed by Wolfe. Here, it is apparent that Wolfe provided Kaye with full and complete authority to negotiate with the Union and reach a final collective-bargaining agreement. Once this became effective on July 14, the ministerial act of signing the agreement became moot.

Under these circumstances, the General Counsel's position is sustained and I find that the Respondent by its acts and conduct described above, violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement but failed and refused to execute the agreement.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the above violation, I shall order the Respondent on request, to sign the collective-bargaining agreement and give retroactive effect to the terms of the agreement to its effective date of August 1, 2004.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The Respondent, Hillard Development Corporation d/b/a Provident Nursing Home, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Service Employees International Union, Local 2020, AFL–CIO, CLC with respect to rates of pay, wages, hours, and other terms and conditions of employment of its employees in the Unit by refusing to execute the collective-barging agreement agreed to by the Respondent and the Union on July 14, 2004.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute, on request by the Union, the collective-bargaining agreement on which agreement was reached on July 14, 2004.

(b) Give retroactive effect to August 1, 2004, to the terms and conditions of employment of the collective-bargaining agreement.

(c) Within 14 days after service by the Region, post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 14, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 2, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain collectively with the Service Employees International Union, Local 2020, AFL–CIO, CLC, with respect to rates of pay, wages, hours, and other terms and conditions of employment of our employees in the appropriate Unit by refusing to execute the agreed upon collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request by the Union, execute the collective-bargaining agreement on which agreement was reached between us and the Union.

WE WILL give retroactive effect to the terms and conditions of employment of the collective-bargaining agreement to August 1, 2004.

WE WILL make whole our employees in the bargaining unit for any losses directly attributable to our not paying them the contractually required wage increases and the sick leave buyout, with interest, that are set forth in the agreed upon collective-bargaining agreement.

PROVIDENT NURSING HOME

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."